Filed 1/15/13 In re Greg F. CA1/5
Opinion on remand from Supreme Cour t

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re GREG F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, **Plaintiff and Respondent,** **v.** **GREG F.,** **Defendant and Appellant.**	**A127161** **(Sonoma County Super. Ct. No. 35283J)**

The juvenile court committed the minor Greg F. (appellant) to the Division of Juvenile Facilities (DJF), dismissing his most recent juvenile delinquency petition (Welf. & Inst. Code, § 602),[1] which alleged an offense that did not qualify him for DJF commitment (§ 733, subd. (c)), and reaching back to an earlier petition that alleged a DJF-eligible offense (§ 707, subd. (b)). On appeal, we reversed the order of commitment. We concluded the court lacked authority under section 782 to dismiss a minor's most recent petition, following the minor's admission to the allegations of that petition, in order to commit him to DJF. The California Supreme Court then reversed our decision and remanded the matter to this court to decide appellant's remaining

[1] All undesignated section references are to the Welfare and Institutions Code.

contentions. (*In re Greg F.* (2012) 55 Cal.4th 393, 420.) We find no merit in these contentions and affirm the order of commitment.

BACKGROUND

September 2008 Assault on Joseph C.

On September 16, 2008, 11-year old Joseph C. was riding his bicycle in Santa Rosa when a car stopped next to him. Three juvenile males jumped out, yelling Norteño gang slogans and displaying gang hand signs. One of the juveniles hit Joseph on the head with a baseball bat, knocking him off his bicycle. Joseph was airlifted to the hospital where he underwent surgery, was hospitalized for seven days, and suffered lingering neurological damage. Joseph identified appellant as the boy who hit him with the baseball bat.

The ensuing 602 petition alleged appellant had committed assault with a deadly weapon and by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), had personally inflicted great bodily injury (*id.*, § 12022.7, subd. (a)), and had acted for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)(C)). Appellant admitted each of the allegations, and the petition was sustained. Because "[a]ssault by any means of force likely to produce great bodily injury" is one of the offenses listed in section 707, subdivision (b), appellant was eligible for a DJF commitment, with a maximum term of 17 years. (§ 707, subd. (b)(14); see § 733, subd. (c).)

The probation department recommended a commitment to DJF based on "the minor's callous act of violence upon a young victim, who continues to be emotionally and physically [a]ffected by the minor's actions, the minor's lack of remorse for the victim, and the risk he poses to the community." Due to the severity of his offense, appellant was not considered a suitable candidate for placement services. Moreover, the probation department believed DJF could best provide him with "appropriate and necessary treatment and rehabilitation services." The juvenile court retained appellant as a ward of the court but rejected the probation department's recommended disposition and instead ordered an out-of-home placement. On January 8, 2009, appellant was placed at

the Wilderness Recovery Center. Throughout this placement, appellant was obstinate, defiant, and unwilling to participate in the therapeutic process or consider terminating his gang association. His noncompliance with the program escalated to the point where he was refusing to participate in treatment services, and in June 2009, the placement was terminated. Staff voiced concern over appellant's entrenched gang involvement and his callous lack of empathy for his victim. On June 11, 2009, he was detained in juvenile hall pending identification of another suitable placement.

August 2009 Battery in Juvenile Hall

On August 16, 2009, during dinner at juvenile hall, appellant and two other Norteño gang members suddenly stood up and attacked three Sureño gang members sitting nearby. Punches were exchanged. Juvenile hall staff members were initially unable to break up the fight.

On August 18, 2009, the district attorney filed a new section 602 petition, alleging appellant had committed two offenses: (1) battery for the benefit of a gang (Pen. Code, §§ 186.22, subd. (d), 242), and (2) knowing participation in a gang (Pen. Code, § 186.22, subd. (a)). Neither offense is "described in subdivision (b) of Section 707." (§ 733(c).) At the detention hearing the next morning, appellant admitted the battery offense and associated gang enhancement. In return, the district attorney dismissed the gang participation count. The juvenile court accepted appellant's admission and set the matter for a disposition hearing.

Two days after the detention hearing, with the probation officer's concurrence, the district attorney filed an ex parte request to calendar a motion to "withdraw" appellant's plea. The following Monday, the prosecutor filed a notice of probation violation under section 777, based on the assault in juvenile hall. The prosecutor admitted that he filed the August 18, 2009 section 602 petition in error, rather than proceeding by way of a probation violation in the first instance. He asked the court to withdraw appellant's plea and strike the petition, stating the prosecution was "trying to get to a [DJF-eligible] offense" in connection with the prior petition because of the probation department's concerns, namely, that "there aren't any placements that are willing to accept [appellant,]

and we don't have anywhere to put him." With the court's permission, the prosecutor filed a formal motion to set aside appellant's admission and dismiss the August 18 petition. The court granted the motion, dismissing the August 18 petition in the interests of justice and appellant's welfare. (§ 782.) The court explained that it dismissed the new section 602 petition to create the "best options" for disposition.

Appellant subsequently admitted the section 777 probation violation, and the court referred the matter to probation for an updated recommendation on disposition. The matter was continued several times to determine whether appellant could be successful in juvenile hall or in another placement short of DJF. When the disposition hearing was held on February 3, 2010, the probation officer reported that appellant and another boy had initiated an unprovoked assault on a rival gang member in juvenile hall. Moreover, in light of his gang involvement and violent behavior in juvenile hall, none of the placement programs the probation officer had contacted were willing to accept appellant. The court committed appellant to DJF, stating he "needs programs that he can't receive [at juvenile hall and h]e's not going to get picked up . . . [by] any normal program. [¶] I know they have a good educational system in [DJF]. I know they have programs there. I have been to judge's training recently, where they have talked about evidence-based programming. They're changing everything. . . . I, at this point, don't see any option." The court set the maximum term of confinement at 17 years.

On appeal, we reversed the February 3, 2010 dispositional order, concluding the juvenile court lacked authority under section 782 to dismiss the 2009 petition for the purpose of reaching back to the 2008 petition containing a DJF-eligible offense in order to support appellant's DJF commitment. (*In re Greg. F.* (A127161, Feb. 23, 2011).) The Supreme Court granted review to resolve conflicting case law and disagreed with our analysis, holding that section 733, subdivision (c) does not deprive the juvenile court of its discretion to dismiss a 602 petition and commit a ward to DJF when, in compliance with section 782, such a dismissal is in the interests of justice and for the benefit of the minor. (*In re Greg F.*, *supra*, 55 Cal.4th at p. 402.) The high court remanded the matter to this court to address appellant's remaining contentions, specifically, (1) that there was

insufficient evidence to show he would benefit from a DJF commitment, and (2) that the juvenile court erred in relying on information received outside the proceedings. (*Id.* at p. 420.)

DISCUSSION

I. *The Sufficiency of the Evidence to Support a DJF Commitment*

A DJF commitment "can only be reversed for abuse of discretion, and in evaluating the evidence and making that determination we must apply the substantial evidence test." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 579.) A DJF commitment must be supported by substantial evidence establishing probable benefit to the minor and demonstrating that less restrictive alternatives are ineffective or inappropriate. (*Id.* at p. 576; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396; see § 734 ["No ward of the juvenile court shall be committed to the [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJF]"].)

The record provides substantial evidence that a DJF commitment would result in a probable benefit to appellant. In its report, the probation department strongly urged the juvenile court to commit appellant to DJF, stating its "strong[] belie[f] the minor would benefit from the restorative justice practices and rehabilitative services offered through [DJF], allowing the minor to positively change his behavior, participate in vocational training, and return to the community truly rehabilitated," where he could "achieve his future goals and become a productive member of society." The probation report notes that participation in the restorative justice process at DJF would allow appellant to "take responsibility for the injuries he caused the victim in his initial offense," and "[g]ain[] insight into the effects his actions had upon the victim and his family . . . [and] insight related to the impact violent crime has upon his community"—an "essential experience" for him. The probation report also notes that a DJF commitment was "necessary to ensure public safety and to offer the minor yet another opportunity for rehabilitation services through the Juvenile Court."

Appellant contends substantial evidence does not show he would probably benefit from a DJF commitment because the record clearly establishes "that his primary rehabilitative need was for sophisticated mental health treatment, including therapy and medication"; "[y]et there was no evidence presented . . . as to whether [DJF] could provide appellant with any mental health treatment, much less at the level of sophistication he needed." (Italics omitted.) Appellant contends he could not benefit from programs at DJF until his mental health symptoms were treated.

In November 2008, psychologist Laura L. Doty conducted a psychological assessment of appellant. She recommended "a dual diagnosis program" that would address both his substance abuse problem and his mental health issues, including depression, obsessive-compulsive disorder, anger management, and family issues. Noting, however, that "there are very few dual diagnosis programs," Dr. Doty recommended "a mental health program," finding appellant's need for substance abuse treatment secondary to his mental health needs. Dr. Doty also recommended a medication evaluation.

Appellant correctly notes that the program into which he was placed in January 2009 was a substance abuse program, not a dual diagnosis program; his primary counselor there was a drug and alcohol counselor, not a therapist; and he did not receive a medication evaluation until late May 2009, just before he was terminated from the program.

Appellant's contentions fail, nevertheless, to alter our conclusion that substantial evidence supports a finding he will probably benefit from a DJF commitment. The juvenile court ordered the probation department to forward appellant's medical records and psychological evaluations to DJF before his commitment began and authorized DJF to provide routine medical and mental health treatment to appellant and continue his psychotropic medication for 60 days, pending its own evaluation.[2] Appellant's counsel did not contend below that more mental health services were required and did not object

[2] Appellant began taking mood-stabilizing medication in May 2009.

to a DJF commitment based on a lack of evidence showing DJF would address his mental health needs. He has waived the right to assert this point on appeal. (See *People v. Zapien* (1993) 4 Cal.4th 929, 966 (*Zapien*) ["defendant's failure to raise this issue in the trial court precludes his present claim of error"]; *In re Sheena K.* (2007) 40 Cal.4th 875, 880-889 [waiver rule applies in juvenile dispositions].)

For the first time in his reply brief, appellant also argues it was unfair to penalize him for minor incidents in juvenile hall while he waited for disposition, since he had not received the recommended mental health treatment. As he failed to raise this point below and did not assert it in his opening brief on appeal, he has waived it as well.[3] (*Zapien, supra*, 4 Cal.4th at p. 966; *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115 [forfeiture of an issue by failing to raise it in opening brief].)

II. *The Court's Alleged Reliance on Outside Information*

Appellant also contends the juvenile court's reliance on information received at judge's training denied him "a fundamentally fair dispositional hearing because he was not privy to what the court had heard at the training and therefore was unable to respond to it." Citing *Zapien*, the People contend appellant has forfeited this issue by failing to object below.

Appellant appears to concede he failed to object below but "urges [this court] to consider his claim on the merits" in its "discretion to address constitutional issues raised on appeal despite the lack of an objection below." He maintains "the issue is 'a pure question of law' turning on undisputed facts or involving important issues of public policy." He contends *Zapien* is distinguishable because the court in that case noted that, "by raising the issue at trial, the record could have been developed as to whether the trial judge could act impartially or whether the officer's credibility should have been decided

---

3 We do not consider the February 12, 2010 "Report of the Special Master" on which appellant relies in contending DJF is "a dangerous, violent and gang-entrenched environment which offers few if any rehabilitation opportunities." This material was not before the juvenile court in February 2010 and is not part of the record before us.

by another judge" while in this case, appellant's "failure to raise the issue in the juvenile court does not affect this court's review."

We decline appellant's request to decide this issue notwithstanding his failure to raise it below. By failing to raise a timely objection to the juvenile court's reliance on information from judge's training, appellant deprived the court of an opportunity to clarify its use of that information and the evidence on which it was relying, and to obtain further information regarding DJF's programs from the prosecutor and the probation department if the record evidence in fact was insufficient to support its decision.

We observe, in any event, that the record contains substantial evidence supporting the juvenile court's decision even if we disregard the information the juvenile court purportedly learned at judge's training:[4] that DJF had implemented "evidence-based programming" and was "changing everything."

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

[4] Appellant concedes that, even if we conclude the juvenile court improperly relied upon outside information, we must affirm the judgment if the remaining evidence is sufficient to support the finding.